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No. 85-1539

In the Supreme Court of the United States

October Term, 1985

RAJINDAR S. SANDHU,
Petitioner,

v.

AAMCO TRANSMISSIONS, INC.,
Respondent.

Brief Opposing Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

C. WILLIAM O'NEILL
VORYS, SATER, SEYMOUR
AND PEASE
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Counsel for Respondent

Of Counsel:
SUZANNE K. RICHARDS
RICHARD D. SCHUSTER
VORYS, SATER, SEYMOUR AND PEASE
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6400

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BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT OF THE CASE

Petitioner is a United States citizen who was born in India. Petitioner initially applied to become, and was approved by respondent[1] to be, a co-franchisee on an existing franchise agreement between respondent and Vijay Nayyar, a resident alien in the United States who is also a native of India. Following this approval as a franchisee, petitioner decided he did not wish to be added to Mr. Nayyar's franchise agreement; instead, he requested that he be granted a new franchise of his own. Respondent

[1]Respondent AAMCO Transmissions, Inc. is a wholly-owned subsidiary of AAMCO Industries, Ltd. Master Lease Corporation and Higgins Delta Corporation are affiliates of Respondent AAMCO Transmissions, Inc.

again approved petitioner as a franchisee, this time for a new franchise in the Columbus, Ohio Standard Metropolitan Statistical Area.

Petitioner then submitted an application to respondent requesting the northeast zone of Columbus, Ohio as the site of his franchise center. At the time petitioner submitted his site application, another franchisee, Mr. Bruce Schwartz, already had an appliction pending with respondent for the same zone. As a matter of established corporate policy, respondent approves site applications submitted by its franchisees on a first-come, first-served basis and respondent does not consider and review any other application for that zone until a final decision is made on the first application. Petitioner was informed of this policy and the fact that the zone was presently unavailable because of Mr. Schwartz's application. Respondent tried to interest petitioner in applying for a different zone which was available and for which respondent was seeking applicants. Petitioner declined to consider locating his franchise outside the northeast zone.

The site application submitted by Mr. Schwartz indicated that a zoning variance would be required for the site he selected. Likewise, the site application submitted by petitioner indicated that a zoning variance would be required for the site he selected.

Respondent, as a matter of corporate policy, routinely approved site applications which required zoning variances. Petitioner was informed of this policy. Mr. Schwartz's application for a site in the northeast zone was eventually approved.

After learning of the approval of Mr. Schwartz's application for a site in the northeast zone, petitioner voluntarily terminated his franchise agreement with respondent and withdrew his application for the northeast zone. Specifically, petitioner in June, 1978, wrote to respondent and indicated that he no longer wanted a franchise for the northeast zone and requested a return of his franchise fees. Pursuant to his request, these fees were returned to petitioner by respondent.

In October, 1978, Mr. Schwartz withdrew his application for a site in the northeast zone. At that time, petitioner was not a franchisee and had no application pending for the northeast zone because of his voluntary termination in June, 1978 of his franchise agreement with respondent.

Shortly after Mr. Schwartz withdrew his application, respondent received an application for a site in the northeast zone from Mr. Vogt. The Vogt application was the first application received for a site in the northeast zone after that zone became available due to Mr. Schwartz's withdrawal of his application. Petitioner did not have an application pending at the time the Vogt application was received and petitioner was not even a franchisee at that time. Respondent followed its ususal first-come, first-served policy and reviewed and approved Mr. Vogt's application.

REASONS FOR DENYING THE WRIT

The Decision Of The Sixth Circuit Is Not In Conflict With Any Decision Of The Ninth Circuit.

There are two reasons why there is no conflict between the decision of the Court of Appeals for the Sixth Circuit in

the instant case and the decision of the Court of Appeals for the Ninth Circuit in *Lowe v. City of Monrovia*, 775 F.2d 998 (9th Cir. 1985). First, the Court of Appeals for the Ninth Circuit in *Lowe* did not hold that summary judgment may never be granted in an intentional discrimination claim arising under 42 U.S.C. §1981 (1982) once a plaintiff has introduced evidence of a *prima facie* case. Second, while in *Lowe* the plaintiff offered evidence of a *prima facie* case and additional evidence raising an issue as to whether the defendant's articulated nondiscriminatory reason for not hiring the plaintiff was pretextual, the petitioner in the present case failed to present evidence to the trial court sufficient to raise an issue of discriminatory intent or motive.

Petitioner alleged in his Complaint that respondent discriminatorily refused him the opportunity to contract with the respondent in violation of 42 U.S.C. §1981 and requested money damages for this alleged violation. Section 1981 was originally designed to uproot the institution of slavery and to eradicate its badges and incidents. Section 1981 is, however, not an affirmative action program. It is an equalization provision, seeking to ensure that rights do not vary according to race. It does not require that persons be accorded preferential treatment because of their race. Thus, "[w]hen a person sues under [Section 1981] to enforce his right not to be discriminated against in private employment, he must show that he was unable to make or enforce a contract that white citizens were able to make or enforce." *Long v. Ford Motor Company*, 496 F.2d 500, 504 (6th Cir. 1974). Moreover, this Court has held that a plaintiff must show that the defendant intentionally discriminated against the plaintiff because of race before a plaintiff

may recover damages under §1981. *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982).

Petitioner contends that the decision of the Court of Appeals for the Sixth Circuit is in conflict with the decision of the Court of Appeals for the Ninth Circuit in *Lowe v. City of Monrovia*, 775 F.2d 998 (9th Cir. 1985). This contention is incorrect. In *Lowe*, the Court of Appeals for the Ninth Circuit recognized that to establish a *prima facie* case in a §1981 action, a plaintiff must offer evidence that gives rise to an inference of unlawful discrimination. Plaintiff's burden is met by offering evidence of the following criteria:

1. That the plaintiff belongs to a class protected by §1981;

2. That the plaintiff applied and was qualified for an opening for which the defendant was seeking applicants;

3. That, despite being qualified the plaintiff, was rejected; and

4. That, after the plaintiff's rejection, the position remained open and the defendant continued to seek applications from persons of comparable qualifications.

See Lowe v. City of Monrovia, 775 F.2d at 1005.

The court of appeals in *Lowe* recognized that once the plaintiff meets her burden of introducing evidence of a *prima facie* violation of §1981, it is then incumbent upon the defendant to articulate a legitimate nondiscriminatory reason for its decision. The *Lowe* decision states that on a

motion for summary judgment in a §1981 case, the defendant's articulation of a legitimate nondiscriminatory reason serves to shift the burden back to the plaintiff to raise a genuine factual issue as to whether the proffered reason is pretextual. *Id.*, at 1008. In order to fulfill that requirement, the plaintiff in *Lowe* submitted evidence showing the defendant would not hire blacks and that defendant urged plaintiff to find a job elsewhere.

While the *Lowe* court recognized the difficulty of rendering summary judgment in a §1981 case, it clearly did not hold that summary judgment could never be granted once the plaintiff introduced evidence of a *prima facie* case. At best, the *Lowe* court concluded that summary judgment should only be granted with great caution in employment discrimination cases where the plaintiff is able to offer evidence of a *prima facie* case.

An examination of both the decision of the Court of Appeals for the Sixth Circuit and the district court's opinion herein reveals that neither decision required the petitioner to prove the respondent's motivation on a motion for summary judgment as petitioner contends. Instead, the opinions recognized that petitioner failed to introduce any evidence of discrimination and that petitioner was trying to rely upon bald, unsupported allegations.

In its opinion, the Court of Appeals for the Sixth Circuit utilized the well-settled standards for establishing a *prima facie* case of intentional discrimination as enunciated in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The court of appeals also indicated that it could "only affirm the district court's decision if viewing the evidence in a light most favorable to [petitioner] no issue of material fact exists as to [petitioner's] discrimination claim." App. to pt. for cert. A-4.

With the standard for a *prima facie* case in a §1981 action clearly in mind, the court of appeals reviewed the record to determine whether there was an issue of material fact to petitioner's claim that he was treated differently than non-minority applicants. It concluded in this regard:

> [Petitioner] does not dispute that Schwartz's application was received by [respondent] first, that [respondent's] legitimate, nondiscriminatory policy was to consider applications on a first-come, first-serve basis, that [petitioner] voluntarily withdrew his application before Schwartz's application lapsed, and that Vogt's application was the next in line after Schwartz's application lapsed. These undisputed facts mandate that we affirm the district court on this issue.

App. to pt. for cert. A-5.

The court of appeals recognized that the undisputed facts placed before the district court failed to establish an issue as to whether petitioner was treated differently than whites or whether respondent withheld the northeast zone from petitioner because of his race. Indeed, the undisputed facts showed no discriminatory treatment.

The record submitted to the district court established that: Mr. Schwartz's application was pending when petitioner submitted his application; respondent reviewed applications on a first-come, first-served basis; and respondent had in the past approved applications pending procurement of a zoning variance. The undisputed facts further established that petitioner voluntarily terminated his franchise agreement with respondent and withdrew his site application. Some four months after petitioner terminated his franchise agreement, Mr. Schwartz voluntarily withdrew his application for the northeast zone and Mr. Vogt

was the first individual to apply for the northeast zone after Mr. Schwartz's application was withdrawn.

From these undisputed facts it can only be concluded that the respondent was not seeking applicants for the northeast zone at the time petitioner applied for the zone, that petitioner's application was never reviewed and rejected, and that the northeast zone did not remain open and respondent did not seek additional applicants for that zone after petitioner withdrew his application. Thus, petitioner failed to offer any evidence to support the second, third and fourth requirements of a *prima facie* case under §1981. The district court properly concluded that there was *no* evidence in the record to support petitioner's allegation of discrimination and the Court of Appeals for the Sixth Circuit properly affirmed the district court's decision.

The Court of Appeals for the Sixth Circuit did go on and state that "even assuming" petitioner established a *prima facie* case, respondent had offered evidence of its legitimate, nondiscriminatory reason for approving Mr. Schwartz's application. Petitioner's mere allegations of discrimination, standing alone, were not sufficient to controvert the evidence which respondent introduced of its reason for considering Mr. Schwartz's application first. No evidence called into question respondent's legitimate, nondiscriminatory policy of awarding franchise zones to qualified applicants on a first-come, first-served basis. There was not even the slightest hint in the record before the district court of discriminatory animus on the part of the respondent. Thus, the Court of Appeals for the Sixth Circuit also correctly found that petitioner had failed to establish a fact question as to whether respondent's reasons were pretextual.

Not only is the record—developed after full and lengthy discovery—devoid of any factual support for petitioner's assertions, but petitioner also seeks to maintain an erroneous proposition of law: that summary judgment cannot be had when a claim involves discriminatory intent. In effect, petitioner is contending that a claim under §1981 falls outside the ambit of Rule 56 of the Federal Rules of Civil Procedure. Neither Rule 56 itself nor any case law, including *Lowe*, supports such a contention. Accordingly, the petition for writ of certiorari filed by petitioner should be denied.

Petitioner Lacks Standing To File A Petition For Writ Of Certiorari In This Case Since He Has Filed A Petition In Bankruptcy.

An additional ground exists for denial or, alternatively, dismissal of the petition for writ of certiorari. On October 21, 1985, the petitioner filed a petition in bankruptcy in the United States District Court for the Southern District of Ohio, Eastern Division. *In re Rajindar and Inderjit Sandhu*, Case No. 2-85-03341 (Bankr., S.D. Ohio, E.D.). Pursuant to 11 U.S.C. §541(a) (1982 & Supp. II 1984), all legal interest which petitioner had in his claim for money damages against respondent became part of the bankruptcy estate. *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U.S. 300 (1911) (estate regarded as *in custodia legis* from the filing of the bankruptcy petition).

The Trustee in Bankruptcy is the representative of the estate and only the Trustee has authority to authorize the filing of additional legal proceedings in this case. *Accord, Meyer v. Fleming*, 327 U.S. 161 (1946) (title of claim rests in bankruptcy trustee). Prior to the filing of the petition for writ of certiorari in this case, neither petitioner nor his

counsel contacted the Trustee to obtain authorization to proceed in this Court. The Trustee himself has not authorized these proceedings. Accordingly, the petition for writ of certiorari filed by petitioner should be denied or, alternatively, dismissed.

CONCLUSION

Petitioner has failed to establish that a conflict exists between the standards followed by the Court of Appeals for the Sixth Circuit in this case and the standards followed by the Court of Appeals for the Ninth Circuit. No factual or legal basis exists for the positions which petitioner asserts in his petition. Additionally, petitioner no longer has authority to pursue this action since he has filed a petition in bankruptcy. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

C. WILLIAM O'NEILL
VORYS, SATER, SEYMOUR AND PEASE
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6336

Counsel for Respondent

Of Counsel:
SUZANNE K. RICHARDS
RICHARD D. SCHUSTER
VORYS, SATER, SEYMOUR AND PEASE
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6400

CERTIFICATE OF SERVICE

I, C. William O'Neill, a member of the Bar of this Court and counsel for respondent herein, hereby certify that on this 15th day of April, 1986, three copies of the Brief Opposing the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit were served, postage prepaid, upon Andrew J. Ruzicho, 3040 Riverside Drive, Suite 102, Columbus, Ohio 43221.

C. WILLIAM O'NEILL

APPENDIX

11 U.S.C. Section 541(a) (1982 & Supp. II 1984)

§541. Property of the estate

(a) The commencement of a case under Section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under Section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under Section 510(c) or 551 of this title.

(5) An interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the

filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, and profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.